

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 0816 of 2011

BETWEEN:

DANIEL CUMBERBATCH

CLAIMANT

AND

CRAIG ATKINS

DEFENDANT

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

Dates of Hearing: 2013 October 8th, 9th, 16th
2015 June 8th

Appearances:

Ms. Shontell Murrell, of Messrs. George Walton Payne & Co. Attorneys-at-Law for the Claimant

The Defendant in person

DECISION

Introduction

[1] In this matter the Claimant filed his action on May 6th 2011 and served the same on June 9th 2011.

- [2] On an application for Default Judgment, it was ordered on the 15th March 2012 “...that the Defendant pay to the Claimant an amount to be determined by the Court.”
- [3] In April 2013, the Claimant filed a document titled Claimant’s Memorandum on Quantum. It was not a sworn document nor was there a Certificate of Truth attached to it; it was signed by the Claimant’s attorney-at-law and was in fact counsel’s written submissions.
- [4] After several abortive attempts, the matter was set down for trial of the quantum of damages on October 8th 2013.

Nature of Proceedings

- [5] The proceedings brought were with respect to damages for personal injury and pecuniary loss occasioned as a result of a motor vehicle accident occurring on the 25th December 2009. The claim alleged that the Claimant was driving E214 along Warrens Terrace West, Warrens in the parish of St. Michael when he stopped in stationary traffic. After he had stopped, the Defendant who was the driver of E 1628, so negligently drove, managed and/or controlled E1628, causing it to collide violently with the rear of the Claimant’s vehicle, E 214.

The Claim

- [6] In view of the foregoing, the Claimant sought the following relief:

- (a) General Damages for Pain and Suffering and Loss of Amenities;
- (b) Special Damages for Past Loss of Earnings;
- (c) Special Damages for Past Domestic Assistance;
- (d) Special Damages for Past Medical and other Incidental Expenses;
- (e) Interest pursuant to the Supreme Court of Judicature Act, Chapter 117A of the Laws of Barbados;
- (f) Costs;
- (g) Any further or other relief that the Honorable Court might deem fit.

THE EVIDENCE

- [7] The Claimant gave evidence and was cross-examined by the Defendant.
- [8] It was his evidence that he sustained an injury to his neck and back (soft tissues of the neck and lower back muscular damage) as a result of the accident. He visited FMH the following day and was directed to use ice packs and prescribed medication on that date. The doctor advised him to obtain physiotherapy and recommended physiotherapist Ms. Cheryl Coppin. He had 23 sessions of physiotherapy, starting initially with twice weekly visits and thereafter once weekly.
- [9] It was his evidence that he was unable to work for that period (the period of physiotherapy) because his back would 'lock-up'. He was scheduled to build a house in January 2010, but he was unable to do so because he would have to do a lot of bending and he was unable to do any bending at that time.

[10] At home, he was unable to cook and clean, and lifting was a problem. Previously, he did the cooking because his wife worked shifts and it was his practice to have the food prepared by the time she arrived home at night. For about 3 months after the accident his wife had to do everything. His wife, he told the Court, worked as a cook in a villa; she worked six days per week, from 8:30 a.m. to 8:30 p.m. when there are guests at the villa. He did not indicate if there were guests at the villa in the period December 2009 to April 2010.

[11] He resumed work in April 2010, but in his opinion he was not fully recovered. He was still experiencing discomfort, but he had bills to pay so he resumed work. He told the Court at this stage, that he is still experiencing pain even as he sat in the chair giving his evidence.

[12] In cross-examination it was put to the Claimant that the accident occurred because he (the Claimant) stopped suddenly and the Defendant's car "bumped" the back of his car. It was put to the Claimant that when the police came he kneeled down to show them the "bump" to his car, to which the Claimant responded:

"A: I don't think that I was kneeling, I probably stooped down".

[13] The obvious inference that the Defendant was asking the court to draw was that the Claimant suffered little damage to his neck and back, and

that it is not possible for the Claimant to have been injured to the extent claimed. The Claimant was adamant that he did not make up his injury and pain; he went to the doctor the next day because he started to experience pain “during the night”.

[14] In cross-examination the Claimant also told the Court that the lifting referred to would have been as a result of moving around furniture when the house was swept every day. In cross-examination, he told the Court that he and his wife shared the domestic duties, but during the time of his injuries his wife did it entirely on her own.

[15] On Loss of Earnings he told the court in cross-examination that masonry and carpentry are only two of the things that he does.

[16] On the issue of Domestic Assistance he told the Court that his wife had a friend who would come and help them do anything but he never offered any money for these services. He did not state how often this friend came, the nature of what he volunteered to do and for what time period (whether for an hour or a whole day or days). When pressed he was very vague as to what “anything” entailed.

[17] On his claim for Transportation Costs, he told the Court that for the first two to three weeks after the accident a friend drove him to the physiotherapist in Belleville and he would provide gasoline.

[18] He produced bills from this person and he explained to the Court that he was charged \$160 round trip from Collins in St. Peter to Belleville, St. Michael and back. It was his evidence that Boscobelle to Bridgetown is \$50 by taxi at the very least. His friend drove him all 23 times to the physiotherapist and the doctor and thereafter (from April 1st 2010) he drove himself.

[19] On the issue of his Loss of Earnings he told the Defendant that he pays National Insurance as a self-employed person but at the time of the accident he was not doing so. He does not pay income tax or file income tax returns. He did not state whether this was because his income fell below the threshold for taxable income or whether there was another reason for this omission. It was some years after the accident that he started keeping a record of his earnings and he has never checked to see what his annual earnings are. The \$25,000 charged for the house that he was contracted to build in January 2010 represented his labour only. He would have hired one other person to assist him in building this house, and if he had to do any concrete work he would also have hired an extra person. It would have taken him just short of a year to build this house, and he would have paid himself and the second workman \$625 per week; he would have paid extra for the steel work and the block work.

[20] Counsel produced a Medical Report by Dr. Michael Wharton and a report by physiotherapist Cheryl Corbin, but declined to call either Dr. Wharton or physiotherapist Cheryl Corbin to give evidence.

[21] The Defendant chose not to give any evidence or to call witnesses.

THE MEDICAL EVIDENCE

[22] The Report of Dr. Michael Wharton of FMH Emergency Medical Associates dated March 26th 2010 was produced to the Court. The Claimant was seen at FMH the day after the accident, December 26th 2009. He complained of neck stiffness and lower back pain. The report indicates that there were no neurological symptoms and no abnormalities were noted. He made mention to the doctor of a previous and similar injury in 1996 with a 4 month recovery period. The doctor's findings on examination were minor: a normal spine with full range of motion and mild tenderness of the trapezii muscles and left paravertebral tenderness. An assessment was made of muscular spasm of the neck and back. Treatment consisted of ice packs, analgesics and muscle relaxants.

[23] Two days later he experienced an intensification of symptoms and was referred to Physiotherapy. By February 17th 2010 the Claimant seemed to have benefited substantially from physiotherapy and his other modalities of treatment, because the doctor recorded a marked

improvement and his examination was unremarkable. He was advised to return to work but to avoid heavy lifting for a period of 4 weeks. Dr. Wharton expressed the view that “with attention to the prescribed home exercise programme he would have been able to regain his pre-accident level of functioning within a further 4-6 weeks.”

[24] The Report of physiotherapist Cheryl Coppin of the Physical Health Clinic dated April 12th 2010 accords with Dr. Wharton’s findings. By that date it was her opinion that the Claimant was not expected to have any long term physical disabilities as a result of his accident of December 25th 2009. At his last visit to her of April 1st 2010 he had been pain-free for approximately three (3) weeks. She assessed him, as of that date, as being “functional in his activities of daily living”.

[25] Her report shows that the Claimant received twenty-three sessions of therapy after her initial evaluation between January 7th and April 1st 2010. She too reported substantial improvement in response to the therapy and noted that “by March he had reported feeling better and was able to perform his exercises without any discomfort.” There is no indication in her Report that the Claimant was unable to work for the period alleged by the Claimant or for that matter was unable to drive.

[26] She expected him to improve and the frequency of his pain episodes to decrease, but she recommended continued participation in an exercise programme”.

Discussion

[27] The Claimant made claims under the following heads:

Pain and Suffering and Loss of Amenities

[28] Under this head the Claimant claims \$10,000.

[29] In support of this quantum his counsel relied on the case of *M (A Child) v Mayhew* (2012) to be found in *Kemp and Kemp*. In this case, a claimant with soft tissue injuries to the neck and back which resolved approximately fourteen weeks post accident (a similar recovery time as this Claimant) was awarded £1900 [£2014 RPI Retail Price Index hereinafter], which has an equivalent value of Bds \$6042.00.

[30] Counsel distinguished that case as being less severe than her client’s as her client received significantly more physiotherapy sessions and medical consultations. However, it must also be noted that that claimant suffered psychological anxiety with stress and had to be referred to a clinical psychologist, which condition resolved six months post accident.

[31] It was her further submission, that using the Judicial Studies Board Guidelines to be found in *Kemp and Kemp*, minor neck injuries attract a

range of awards from £1500 to £5600. While the range for a minor back injury is £1500 to £8900.

[32] This Court also looked at the following cases:

In *Barter v Brannigan* (2008) found at Kemp and Kemp F1-157, the Claimant was awarded £1100 (£1320 RPI) having sustained mild tenderness in the right trapezium muscle after being injured when the defendant drove his vehicle into the rear of her stationary car at a junction. The Claimant therein recovered within ten (10) weeks of the accident.

In *Mills v Mylward* (2007) Kemp and Kemp F1-147 the claimant was injured when the defendant's vehicle collided with the rear of his motorcar. The claimant suffered injury to his neck and shoulders as well as travel anxiety. He took paracetamol for the pain and was advised to rest. The symptoms fully resolved within four (4) months. He was awarded General Damages of £1300.00 (£1625 RPI).

In *Noble v Fraser* (2001) Kemp & Kemp M1-012 the claimant suffered soft tissue injuries to his neck mid-lower back, right knee, head, wrist and chest. He took 2 weeks off work and the medical report showed that the pain was to settle within 10 months. The court made an award of £3,000 (RPI adjusted to £4,440) for pain and suffering, loss of amenities.

In *McCormack v Walker* (2006) Kemp & Kemp M1-023, the claimant who had suffered whiplash injuries to her neck and lower back as a result of a road traffic accident was awarded £2,700 (RPI adjusted to £3,537). The neck injury was resolved within 3 months and the back injury resolved within 6 months.

The claimant in *LH (A Child) v Environment Agency* (2002) Kemp & Kemp M1-054 was awarded £1,250 (RPI adjusted to £1,825) after she was injured in a road traffic accident. There, she suffered soft tissue injuries to her neck and lower back, contusion to right loin are and tenderness of lower posterior ribs.

This Court also looked at *Mir v Marshall* (2006) Kemp and Kemp F1-145 where the claimant was awarded £1300 (RPI adjusted to £1703), having sustained a neck injury from a vehicular accident, and fully recovered within three months.

[33] A review of the evidence and medical reports in this matter shows that the Claimant suffered muscle spasms and experienced mild tenderness in his neck and back muscles. His pain level overall was assessed as mild. There were no neurological symptoms and the Claimant responded well to physiotherapy, painkillers and muscle relaxants. There is no continuing or long term disability. There was a temporary limitation in the performance of household chores and approximately six weeks post injury the Claimant was allowed to return to work with a further directive to avoid heavy lifting for a further four weeks (see Report of Dr. Wharton). While accepting that the Claimant was injured, this Court formed the impression when he gave oral evidence that he sought to exaggerate its severity and duration.

[34] Having applied the five criteria for assessment laid down by Wooding CJ in *Cornilliac v St. Louis*, [1965] 7 WIR 491 it is my opinion that this Claimant should receive an award in the region of £3000 or \$9000 Barbados dollars.

Special Damages for Past Loss of Earnings

[35] Under this head the Claimant claimed the sum of \$28,200.00 representing the loss of two prospective job offers he was forced to decline as a direct result of the accident.

- [36] This Court was concerned by the quality of the evidence produced in support of this head of damage. It is here significant to mention that there was no affidavit or *viva voce* evidence on this issue. The Claimant's attorney submitted as an exhibit of her written submissions two letters from a Kenrick Barrow titled TO WHOM IT MAY CONCERN. There was no authentication of the signature by the author's Witness Statement or Affidavit and no further documentary evidence.
- [37] With respect to the second job lost, there was merely a bald assertion in counsel's written submissions (not in the Claimant's oral evidence) and no evidence (documentary or otherwise) produced to the Court.
- [38] While stating that he paid National Insurance (though not at the time of the accident), there was neither National Insurance returns or Income Tax returns to guide this Court as to the income lost from January to March 2010. While the evidence establishes that the Claimant returned to work in March 2010, the doctor's report supports a readiness for work by February 15th 2010 but no attempt was made to provide evidence of his earnings for the rest of 2010, bearing in mind that it was his evidence that he would have spent most of 2010 building the mentioned house.
- [39] This state of affairs did nothing to discharge the burden or standard of proof required.

[40] No award is accordingly made under this head.

Damages for Past Domestic Assistance

[41] Under this head, the Claimant, on the authority of *Cunningham v Harrison* [1973] 3 All ER 463 and *Housecroft v Burnett* [1986] 1 All ER 332 claimed the sum of \$1530, being \$127.50 per week for twelve (12) weeks.

[42] This claim was based on the Claimant's inability to perform his domestic chores and household chores such as gardening. In his oral evidence however, he stated that his wife had to do everything in the house when previously they shared the chores, as he could not cook or clean as lifting was a problem. It is not clear from counsel's submission if this amount related to the claim of the Claimant's wife and their friend or if it was simply a claim with respect to their friend who would come and do "anything".

[43] I am inclined to the view, however, primarily from the oral evidence of the Claimant that this claim relates to the assistance provided by the friend.

[44] While the law allows a court to make an award in cases where an injured claimant has received gratuitous assistance from a friend or family member, the evidence in this case failed to discharge the basic evidential

burden necessary to ground such a claim. The evidence of the Claimant (his wife gave no evidence) fails to establish what the ‘friend’ did, how often he/she did it and for how long (in other words did it entitle him to remuneration of three day’s pay for 12 weeks?).

[45] In view of the above, I am of the view that the Claimant has failed to discharge his evidential burden, and for that reason I decline to make an award under this head.

Special Damage for Past Medical and other Incidental Expenses

[46] The following medical expenses are accepted and proven to the satisfaction of this Court:

	\$
1 Medical Services from FMH Emergency medical Clinic	340.00
2. Physiotherapy Services	1735.00
3. Physiotherapy Report	500.00
4. Medication	30.47
	<hr/>
Total	<u>2605.47</u>

Transportation Costs

[47] The Claimant submits a claim for transportation costs of \$4160.00. This represents 26 trips to the doctor and physiotherapist at \$160 per trip.

[48] This claim caused me some difficulty for several reasons:

1. This was by all accounts a relatively minor accident and injury and there is nothing in the medical report or in the oral evidence suggestive of the fact that the Claimant could not drive as a result of his injury. Certainly as early as February 15th 2010 Dr. Wharton considered him fit to return to work, but merely cautioned against any heavy lifting. The Claimant however gave evidence that he returned to work in April.
2. This Court did not address its mind to whether the sum of \$160 from St. Peter to Belleville was reasonable, but it certainly addressed its mind to whether the Claimant acted reasonably in hiring a taxi operator on 26 occasions in these particular circumstances.
3. It was clear from the evidence that the Claimant was without this car for three days as a result of the accident. His household had two vehicles, a van which he usually drove, and the car which his wife drove. It was this car which was damaged in the accident. Thus, it is safe to infer that the use of a taxi was not a consequence of the unavailability of his own transportation as a consequence of the accident.
4. Against this background, this Court was concerned that the submitted receipts were not an exhibit of a sworn document. These submitted documents raised on the face of them queries that could not be addressed.

[49] The general principle is that the Claimant is only required to act reasonably. The burden of proving that he has acted unreasonably lies on the Defendant.

[50] In view of the above, this Court was not satisfied that the Claimant has proven that it was reasonable to incur this expense or that he had incurred this expense.

Conclusion and Summary

[51] In conclusion, court assessed damages in this matter are as follows:

	\$
General Damages	9000.00
Special Damages	2605.47
Total	<u>11,605.47</u>

Disposal

[52] The Claimant is awarded the sum of \$11,605.47 as indicated above.

[53] The said sum shall bear interest on the special damages at a rate of 6% from the date of issue of the claim form until today.

[54] Both Special Damages and General Damages shall bear interest at the rate of 6% per annum from today until payment.

[55] The Claimant shall have his costs assessed, if not agreed.

MARGARET A. REIFER
Judge of the High Court